

STATE OF MICHIGAN
COURT OF APPEALS

BURGER STRUCTURAL STEEL COMPANY,

Plaintiff-Appellee,

V

RICHMOND STEEL ERECTORS, INC.,

Defendant-Appellant,

and

METRO INDUSTRIAL CONTRACTING, INC.,

Appellant.

UNPUBLISHED

July 1, 2003

No. 236966

Wayne Circuit Court

LC No. 01-117255-CK

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

In this action for breach of contract and to reduce the bond required to discharge a construction lien, Metro Industrial Contracting, Inc., (Metro) appeals by right the trial court's denial of its motion to intervene. We affirm.

I. Facts and Proceedings

In 2000, plaintiff, Burger Structural Steel Company, agreed to perform construction services related to the construction of the Detroit Science Center. Later that year, plaintiff entered into a subcontract with defendant, Richmond Steel Erectors, Inc. In that contract, defendant agreed to unload and erect all structural steel, bar joists, and metal decks for the project for a fixed sum of \$298,200. In its complaint filed on May 22, 2001, plaintiff alleged that defendant breached the contract by failing to provide adequate labor to timely complete the project, failing to appropriately manage and perform its work, failing to pay its subcontractors, materialmen, and laborers, and failing to complete the tasks it agreed to perform. Plaintiff further alleged that because of defendant's breach, plaintiff had incurred \$379,709.29 in damages, and that its damages continued to accrue.

Before plaintiff filed its complaint, however, defendant notified its secured creditors, Metro and Bank One, that defendant did not have the "financial wherewithal" to satisfy its debts. Therefore, defendant surrendered "possession of all assets of the [defendant] company

constituting your collateral as your interests may appear” to Metro and Bank One. Shortly thereafter, on April 18, 2001, defendant filed a claim of lien against the Detroit Science Center property in the amount of \$670,693.30, stating that it received payment of only \$161,083.10 of its contract amount of \$831,777. Subsequently, Bank One sent plaintiff a letter claiming that plaintiff owed defendant \$182,019.27 and that plaintiff should make payment on that debt directly to Bank One.

In its complaint, however, plaintiff disputed that it owed defendant any money and alleged that the amount of defendant’s lien exceeded the subcontract amount and included amounts owed to defendant’s subcontractors. Pursuant to MCL 570.1116, plaintiff requested that the court reduce the bond required to discharge defendant’s lien to \$295,856.18, an amount equal to twice the amount Bank One claimed that plaintiff owed defendant, minus the amount of an additional lien filed by one of defendant’s subcontractors on the Detroit Science Center property. Plaintiff also requested that the court “[g]rant such other relief as is appropriate.”

In June 2001, plaintiff advised Metro of its intent to reduce the bond required to discharge the lien and inquired of Metro’s counsel whether anyone at Metro would accept service of the complaint on defendant’s behalf. Metro’s counsel advised plaintiff that defendant had ceased operating its business and that no one worked at defendant’s place of business. Plaintiff, therefore, sought and received authorization from the trial court to perfect service by sending the summons and complaint by certified mail to defendant’s last known place of business and the Department of Consumer and Industry Services. Plaintiff served defendant in this manner on June 13, 2001.

Plaintiff moved for reduction of the bond on July 5, 2001. Plaintiff stated in its motion that although defendant had been served by alternate service, plaintiff had discussed the matter with Bank One and Metro and had served each of them with a copy of the complaint. On July 10, 2001, counsel for plaintiff met with counsel for Metro to discuss defendant’s lien. The attorneys for plaintiff and Metro did not reach an agreement during their meeting.¹ Two days later, the court defaulted defendant because it failed to appear or otherwise defend against plaintiff’s claims.

The following day, July 13, 2001, the trial court heard and granted plaintiff’s motion to reduce the bond required to discharge defendant’s lien. Plaintiff posted the bond the same day, and the Wayne County Clerk’s office sent defendant a notice indicating that the bond was posted.² Also on July 13, 2001, plaintiff filed a motion for entry of a default judgment for \$405,252.86, an amount equal to the damages plaintiff incurred as a result of defendant’s breach (\$624,642.31) minus the “maximum contract balance” plaintiff owed defendant (\$219,389.45).

¹ Metro asserts on appeal that plaintiff indicated through counsel that plaintiff would submit a counter-offer to Metro’s offer after the meeting and that it would not proceed with its suit in the meantime.

² The Wayne County Clerk’s office sent an additional notice to defendant and the attorney who signed the lien on August 6, 2001.

On August 17, 2001, Metro filed a motion to intervene.³ Metro claimed that it was a secured creditor of defendant and that monies plaintiff owed defendant represented collateral subject to the security interests of Metro and Bank One.⁴ Metro further stated that it had an interest in the matter that was not adequately represented by defendant, given that defendant was in default. Metro also claimed that the bond amount was inadequate because the construction lien was actually less than what plaintiff owed defendant. Metro asserted that its motion was timely because plaintiff, during settlement negotiations, had not indicated that it would proceed with its complaint, and that it filed its motion just ten days after the Wayne County Clerk's office had notified it that the bond had been posted.⁵

Plaintiff opposed Metro's motion to intervene. The trial court heard Metro's motion, as well as plaintiff's motion for entry of a default judgment, on August 31, 2001. The trial court granted plaintiff's motion for a default judgment⁶ and denied Metro's motion. The trial court stated that Metro's motion to intervene was untimely and that it believed that Metro had notice⁷ prior to the first notification letter from the Wayne County Clerk's office. This appeal followed.

II. Standard of Review

We review for abuse of discretion the trial court's decision to deny Metro's motion to intervene. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001). An abuse of discretion exists when the result is "so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

III. Analysis

Metro first argues that the trial court abused its discretion by denying its motion to intervene. We disagree. MCR 2.209(A), addressing intervention as of right, provides:

(A) On timely application a person has a right to intervene in an action:

* * *

³ In its motion to intervene, Metro also objected to the adequacy of the bond reduction and discharge of the lien.

⁴ Metro did not, however, file a copy of its security agreement with its motion or inform the trial court of the extent of its secured interest. Metro also did not submit a pleading with its motion, as required by MCR 2.209(C).

⁵ Contrary to Metro's assertion in its motion, the lien had not yet been discharged when it filed its motion. The Wayne County Clerk's office discharged the lien on August 20, 2001.

⁶ The default judgment awarded plaintiff \$314,732, "over and above all legal setoff."

⁷ Although not entirely clear in the record, it appears that the trial court was referring to Metro's notice of plaintiff's claim against defendant.

(3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"[A]n intervenor must be diligent, and any unreasonable delay after knowledge of the action will justify a denial of intervention where no satisfactory excuse is shown for the delay." *Prudential Ins Co of America v Oak Park School Dist*, 142 Mich App 430, 434; 370 NW2d 20 (1985). Federal courts have indicated several factors that a trial court may consider in evaluating the timeliness of a motion to intervene.⁸ Those factors include (1) the stage of the proceedings; (2) the purpose for intervening; (3) how long the proposed intervenor knew of its interests before moving to intervene; (4) prejudice to the original parties resulting from the proposed intervenor's failure to promptly move to intervene after learning of its interest in the litigation; (5) any "unusual circumstances" militating against or in favor of intervention. *Grubbs v Norris*, 870 F2d 343, 345 (CA 6, 1989). "Timeliness should be evaluated in the context of all relevant circumstances" *Bradley v Milliken*, 828 F2d 1186, 1191 (CA 6, 1987).

The trial court did not abuse its discretion in denying Metro's motion because it was untimely. Plaintiff demonstrated that it provided Metro with written notice of the action and its intent to reduce the bond in June 2001. Metro does not dispute that it had notice of the action, but argues that, after meeting with counsel for plaintiff on July 10, 2001, Metro's counsel was left with the impression that plaintiff was not going to further pursue its action in light of continuing settlement negotiations. However, despite the fact that weeks passed without a counter-offer from plaintiff, Metro did not pursue its claim until after the Wayne County Clerk's office notified Metro that the bond had been posted. Additionally, the argument Metro asserted below differs from its argument on appeal. In Metro's motion to intervene and brief in support of its motion, Metro claimed that plaintiff did not give Metro any indication that it *was* going to proceed with its complaint, not that plaintiff affirmatively stated that it *was not* going to proceed.

Moreover, Metro does not explain its failure to request intervention prior to the time plaintiff allegedly assured Metro that it was not proceeding with its complaint. Plaintiff informed Metro by letter dated June 11, 2001, that it was in the process of posting a bond to discharge the lien. Additionally, Metro knew that defendant had ceased doing business and that plaintiff was unable to locate anyone to personally serve. These facts should have put Metro on notice that defendant may not adequately represent Metro's interests and that it may have a right to intervene.

Metro asserts that its motion was timely because it was filed approximately two months after plaintiff filed the complaint. However, as stated above, the passage of time should be considered in conjunction with the stage the proceedings have reached when intervention is

⁸ While it is not binding, federal precedent can contribute to our analysis because MCR 2.209 is similar to the federal rule concerning intervention, FRCP 24. *D'Agostini v City of Roseville*, 396 Mich 185, 188; 240 NW2d 252 (1976); *Dean v Dept of Corrections* 208 Mich App 144, 151; 527 NW2d 529 (1995).

requested. By the time Metro filed its motion, the trial court had reduced the bond, and the county clerk's office was on the verge of discharging the lien. By the time the trial court heard Metro's motion, the lien had been discharged. Compare *Karrip v Twp of Cannon*, 115 Mich App 726, 731; 321 NW2d 690 (1982) (stating that the motion to intervene was timely when it was filed two months after the complaint was filed, but before discovery and other court proceedings had taken place).

In sum, Metro has not demonstrated that the trial court's decision was "so palpably and grossly violative of fact and logic that it evidence[d] a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Accordingly, the trial court did not abuse its discretion in denying Metro's motion.

Metro also claims that the trial court violated its due process rights by entering a default judgment in plaintiff's favor without joining Metro as an indispensable party. Because Metro did not raise this claim in the trial court, it has not been properly preserved, and we decline to address it for the first time on appeal.⁹ *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Affirmed.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen Fort Hood

⁹ Additionally, we note that Metro, in framing its argument on this issue, misstates the facts of this case. Metro asserts that plaintiff did not request in its complaint the money judgment eventually entered by the trial court. On the contrary, plaintiff specifically alleged that defendant breached the contract, causing at least \$379,709.29 in damages. Plaintiff's complaint not only requested that the trial court reduce the bond, but requested that the trial court "[g]rant such other relief as is appropriate." See also MCR 2.601.